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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 614

THE AVIATION CORPORATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 30-37) is reported in 46 F. Supp. 491.

JURISDICTION

The judgment of the Court of Claims was entered June 1, 1942 (R. 38). On July 28, 1942, the petitioner filed a motion for a new trial which was overruled October 5, 1942 (R. 38). The petition for a writ of certiorari was filed January 4, 1943 (R. 38). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Petitioner is the successor of Universal Aviation Corporation, and former officers of both corporations had been indicted with respect to Universal's income tax liability arising out of a transaction between petitioner and Universal prior to Universal's absorption by petitioner.

A compromise agreement was entered into between the petitioner and the Attorney General, whereby petitioner paid some \$350,000 in full settlement of all tax liability and the indictments were dismissed. May petitioner disavow the compromise agreement and maintain this suit to recover the amount paid?

STATUTES INVOLVED

The applicable statutes involved are set forth in the Appendix, *infra*, pp. 10-14.

STATEMENT

The findings of the court below (R. 13-30) may be summarized as follows:

The Aviation Corporation, petitioner herein, acquired all the assets of the Universal Aviation Corporation on or about April 22, 1931. This case grows out of Universal's income tax liability for the period January 1 to August 1, 1929, with respect to a transaction between Universal and petitioner during that period. (R. 13, 14.)

On June 1, 1934, the Acting Commissioner of Internal Revenue recommended that the Depart-

ment of Justice institute criminal proceedings against certain persons who had been officers of the two corporations during the period in question (R. 13, 14). On June 20, 1934, two indictments were returned in the United States District Court for the Eastern District of Missouri, charging some of the former officers with an attempt to evade Universal's taxes and charging a number of them with a conspiracy to evade these taxes (R. 14, 15).

On January 9, 1935, the petitioner, by its vice president, R. S. Pruitt, sent a letter to the Attorney General, in which reference was made to the pending criminal cases and in which it was recognized that the Government was asserting against the petitioner, as transferee of Universal, the full amount of the tax plus interest (R. 16-17). The aggregate amount involved was calculated to be \$349,532.34, and the letter enclosed an unendorsed cashier's check in that amount (R. 17)—

in full settlement of said alleged tax liability, upon the understanding that you will receive the same in such full settlement and at once dismiss the indictments heretofore handed down in connection with said transaction, in the District Court of the United States for the Eastern District of Missouri, and take no further proceedings, criminal or civil, against any party or interest.

Any error in computation, either in your favor or in ours, will be adjusted.

Thereafter, various correspondence ensued between the petitioner's duly authorized representatives and the Department of Justice in the course of which the above offer was withdrawn. On August 13, 1935, the offer was renewed and the former letter of withdrawal withdrawn (R. 17-20). The offer of the petitioner was finally accepted, and Raymond S. Pruitt was advised of such acceptance by Assistant Attorney General Wideman on August 27, 1935, the letter containing the following statement (R. 21):

Upon careful consideration the Attorney General has accepted the offer upon the condition that the court be fully informed so that it may have opportunity to interpose any objection it may deem proper to the entry of orders of nolle prosequi and, in the event the objection is so interposed, the acceptance is not to be effective.

On September 10, 1935, a special assistant to the Attorney General, appeared before the United States District Court in St. Louis and moved the court to enter an order of nolle prosequi as to the indictments. The court thereupon made inquiry as to whether anyone present had any objections to the entry of the order and receiving no response, the motion was granted (R. 21-22).

Thereafter, R. S. Pruitt endorsed the cashier's check referred to above, and it was placed in the Collector's 9-D account in the office of the Collector of Internal Revenue, St. Louis, Missouri (R. 22).

Later, upon a recomputation made by the income tax unit, the amount of tax and interest due was determined to be \$350,272.54, and the petitioner, when requested, paid the additional amount of \$760.95 (R. 22-25).

On the income tax assessment list for the month of April, 1936, First Missouri District, the Commissioner of Internal Revenue made an assessment against the Universal Aviation Corporation in the amount of \$350,293.29 covering the payments made by the petitioner in accordance with the compromise agreement (R. 25).

On August 26, 1937, the petitioner, as transferee of Universal Aviation Corporation, filed a claim for refund in the amount of \$350,293.29 (R. 25-28), which was rejected on May 27, 1938 (R. 29).

This suit was filed on May 9, 1940 (R. 1). On October 28, 1940, the Government filed a special plea in bar (R. 5-8). Plaintiff replied (R. 8-12), and the case was tried and heard on the special plea (R. 12). The Court of Claims held that the settlement had been legally consummated and that it stood as a bar to the maintenance of the present suit.

ARGUMENT

The decision below is correct and does not present a conflict.

Apart from the fact that it is within the inherent powers of the Attorney General to com-

promise cases involving the Government (see 38 Ops. Atty. Gen. 98, and authorities cited), the settlement herein was executed pursuant to specific authority of law. The Act of June 30, 1932 (Appendix, *infra*, pp. 11-14) gave the President broad powers to reorganize the executive departments of the Government, and, acting under those powers, the President by Executive Order No. 6166, Sec. 5, transferred to the Department of Justice the function of litigating all claims of or against the Government, and provided in addition that:

As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

Moreover, the Internal Revenue Code (53 Stat. 1), which is merely declaratory of existing law,¹ provides:

SEC. 3761. COMPROMISES.

(a) *Authorization*.—The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury,

¹ The report of the Senate Committee accompanying the bill which provided for the Code unambiguously stated that "It makes no changes in existing law." See Appendix, *infra*, p. 14.

may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.

* * * * *

Petitioner, however, relies upon the provisions of Section 3229 of the Revised Statutes (Appendix, *infra*, pp. 10-11) and upon *Botany Mills v. United States*, 278 U. S. 282, which applies those provisions. Section 3229 authorizes the Commissioner to compromise internal revenue cases upon recommendation of the Attorney General, and it was held in the *Botany Mills* case that subordinate officers of the Commissioner could not compromise a case under those provisions. But the *Botany Mills* decision does not hold that Section 3229 had deprived the Attorney General of the power, which has always been regarded as inherent in his office (38 Ops. Atty. Gen. 98) to compromise litigation prosecuted by him together with any other matters germane thereto. And in any event, the Act of June 30, 1932, and the executive order issued thereunder must be regarded, to the extent relevant, as having superseded Section 3229. Cf. *Duncan v. United States*, 39 F. Supp. 962 (W. D. Ky.).

Neither *Cloister Printing Co. v. United States*, 100 F. (2d) 355 (C. C. A. 2d), nor *Staten Island*

Hygeia Ice & Cold Storage Co. v. United States, 85 F. (2d) 68 (C. C. A. 2d) furnish a basis for certiorari. Although those decisions may be open to challenge, neither of them involved a compromise made by the Attorney General, and Executive Order No. 6166 had no bearing upon the controversies.

There is no merit to petitioner's contention that the payment of the claim in full is no compromise. The agreement took the form of a compromise and the status quo cannot be restored at this late date; the petitioner is therefore not entitled to recover. Cf. *Castle v. United States*, 17 F. Supp. 515 (C. Cls.), *Walker v. Alamo Foods Co.*, 16 F. (2d) 694 (C. C. A. 5th), certiorari denied, 274 U. S. 741. Neither is there any substance to the contention that the agreement was entered into through duress. The facts clearly show that the petitioner itself voluntarily made the compromise offer, and that it was some time before the offer was accepted by the Government. There is absolutely nothing to support the contention (Pet. Br. 15) that there was a threat that if the full amount of the tax was not paid, former officers would be brought to trial. These officers had already been indicted and the trial date set (R. 15) when the petitioner made the offer. Petitioner has obtained all it sought to obtain under the offer by having the indictments dismissed and is now seeking to repudiate it. It clearly has no standing in the courts.

CONCLUSION

No conflict of decisions has been shown, and the decision below is correct. The petition should be denied.

Respectfully submitted.

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FEBRUARY 1943.